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MR. JUSTICE HARLAN: DUE PROCESS AND CIVIL LIBERTIES

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I. INTRODUCTION

"Due process of law," originally equated with the term "law of the land" and apparently intended as a purely procedural safeguard, became a significant part of the American constitutional system when the phrase was inserted in the fifth amendment. But as a guaranty of procedural fairness, as well as a substantive requirement of reasonableness in legislation, the due process concept received relatively little attention until after the Civil War when it was applied to the states in the fourteenth amendment.[1]

Some issues which would be relevant to a consideration of the difficulties generated by the phrase, especially with reference to its restrictions upon the use of state police powers, had been settled by the time the fourteenth amendment was ratified: (1) The Bill of Rights was more than a half century old, explicitly protecting the people against unwarranted intrusion by the national government[2] and echoing a recognition of certain fundamental values essential to a society such as Americans were trying to build. (2) The doctrine of judicial review had been established,[3] and it was clear that to the judiciary, and more

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1. From the outset of our constitutional history due process of law as it occurs in the Fifth Amendment had been recognized as a restraint upon government, but, with one conspicuous exception, only in the narrower sense that a legislature must provide "due process for the enforcement of the law;" and it was in accordance with this limited appraisal of the clause that the Court disposed of early cases arising thereunder.

N. SMALL & L. JAYSON, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 39, 88th Cong., 1st Sess. 1082 (1964).

2. Before the adoption of the fourteenth amendment the Bill of Rights was held to limit the federal government, but not the states. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

3. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) established the doctrine of judicial review in this country; Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) is the first clear precedent for the proposition that the Supreme Court is empowered to hold state laws unconstitutional. Two other cases, decided in 1816 and 1821, precluded further serious doubts about the Court's authority over the states. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Cohen v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). *See* R. McCLOSKEY, THE AMERICAN SUPREME COURT 48-53 & 59-65 (1960).

particularly, to the Supreme Court, would fall the responsibility of breathing life into the vague notions of due process. (3) Although the various states had retained great power to order society within their boundaries, it was becoming evident that the complexities of industrialization and mobilization would shift more responsibility to the central authority.

So it is against this backdrop that the High Court has been called upon, as anticipated, to give meaning to the amorphous concept. The perplexities of a fledgling free-enterprise system and the rights of the workingman within this framework dominated the Court's fourteenth amendment activities during the latter part of the nineteenth and early part of the twentieth century.[4] But over the past several decades, the Court has strived to consolidate the nation's gains by turning its attention to a most crucial problem—the relationship between the individual and government. This has required response to two interrelated questions: (1) How do we retain the philosophical tenets of individual autonomy and freedom in a modern society? (2) How do we maintain our historical commitment to federalism and at the same time assure nationwide application of these philosophical tenets?

Because of the traditional notion implicit in the concept of federalism that the state shall play a large and important role in ordering the lives of its citizens, the due process clause of the fourteenth amendment has risen to new heights of significance and controversy during the fifties and sixties when the struggle for civil liberties demanded the attention of the Court. In the finest tradition of Anglo-American jurisprudence, the interpretation and application of the notions embedded in the clause has been a never-ending task.

John Marshall Harlan came to the Supreme Court at a time when the Court's involvement in civil liberties was in full bloom, and the due process clause was becoming a household phrase. The Court was beginning to tackle some of the most difficult socio-legal problems in the nation's history, such as speech, press, religion, racial discrimination, and administration of criminal justice. How Justice Harlan has responded to these contemporary problems, and how he has seen fit to impose the judg-

4. R. McCLOSKEY, THE AMERICAN SUPREME COURT 101-79 (1960). This is not to say, of course, that other issues did not arise. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880); The Civil Rights Cases, 109 U.S. 3 (1883).

ments of the federal judiciary on the states is the subject of this article. Such a project involves delving into the philosophies of Cardozo and Frankfurter, civil libertarianism and federalism, separation of power and judicial restraint.

Justice Harlan is the grandson of a fiery nineteenth-century liberal who is remembered for his dissent from the Court's approbatory stance on the "separate-but-equal" doctrine in *Plessy v. Ferguson*.[5] Born in Chicago, the present Justice Harlan was educated at Princeton and New York Law School, and as a Rhodes Scholar, at Oxford. A Dewey Republican, he practiced law on Wall Street within the upper-crust circles, served admirably on several state commissions, and sat briefly on the Court of Appeals for the Second Circuit before being appointed by President Eisenhower to succeed Mr. Justice Jackson. At the congressional hearings in 1955, the nominee gained the confidence of the politicians as he handled himself discretely against a series of attacks by superpatriots who questioned his concern for internationalism and the work of the United Nations.[6]

The New Yorker undoubtedly brought to the Court a respect for the philosophies of two great legal scholars, Justice Benjamin Cardozo and the then active Justice Felix Frankfurter. As reflected in his opinions over the past thirteen years, he was influenced in his thinking on due process problems by his companion of seven years, Frankfurter, who in turn had been greatly influenced by Holmes and Brandeis.[7]

II. THE PRECEPTS OF CARDOZO AND FRANKFURTER

Justice Cardozo came to the Court in the early thirties, after a dozen years on the New York Court of Appeals, to replace Justice Brandeis. Under his leadership the New York court was among the finest in the country's history. His astuteness and convincing style of writing were reflected in such decisions as *Palsgraf v. Long Island Railroad*[8] and *MacPherson v. Buick*

5. 163 U.S. 537 (1896), *overruled in* Brown v. Board of Educ., 347 U.S. 483 (1954).

6. *See Hearings Before the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. 129 *et seq.* (1955).

7. RODELL, NINE MEN 269-273 (1955).

8. 248 N.Y. 339, 162 N.E. 99 (1928).

Motor Co.,[9] and his genius was manifest in a series of lectures delivered at the Yale Law School.[10]

His concern for social justice in an age of expanding business and big government was apparent in his decisions, but he was constantly aware of the dangers of judicial activism. As Frankfurter was later to exclaim: "We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."[11] And as Cardozo noted in a classic statement in 1921:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.[12]

His attitude toward due process is best summarized in *Palko v. Connecticut*,[13] in which the defendant contended that the state's appeal from a verdict of not guilty and subsequent re-trial amounted to double jeopardy as prohibited by the fifth amendment in federal cases and allegedly by the fourteenth amendment in state cases. Rejecting the "incorporation theory," Cardozo instead pursued the "absorption theory:"[14]

> We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of

9. 217 N.Y. 382, 111 N.E. 1050 (1916).

10. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); B. CARDOZO, THE GROWTH OF THE LAW (1924).

11. Terminiello v. Chicago, 337 U.S. 1, 8 (1949) (dissenting opinion).

12. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).

13. 302 U.S. 319 (1937).

14. The difference between incorporation and absorption is not merely a technical one, but one which involves basic problems of constitutional theory. Frankfurter makes the distinction in Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 Harv. L. Rev. 746 (1965). Justice Black recognizes the distinction on many occasions, such as in his dissenting opinion in Adamson v. California, 332 U.S. 46, 68 (1947).

> absorption. . . . If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.[15]

It was in *Palko* that Cardozo defined due process as a guaranty of those immunities, privileges, and fundamental freedoms protected from infringement by the states because they had been found "to be implicit in the concept of ordered liberty . . . ."[16]

Successor to the "scholar's seat," Frankfurter was of national prominence prior to his 1939 appointment, having been a professor at Harvard Law School since 1914 along with the likes of Pound, Williston, Seavy, Scott and Chafee. He was an authority on the federal court system, as well as constitutional law. He was intimate with both Holmes and Brandeis, whose concepts of civil liberties he tempered with judicial restraint and applied to a new era.

Frankfurter cannot be accused of treating the Constitution as a listing of immutable dogmas on parchment. He recognized the Constitution as "not a fixed body of truth but a mode of social adjustment,"[17] and called upon the Court to respond "to the potentialities of the Constitution to meet the needs of our society."[18] His faith in the democratic system and in human dignity was well known.[19] But in an age of judicial activism he refused to permit his own notions of individual rights and the imprudence of state legislation to shape the contours of due process.

In a case made famous by Justice Black's dissent, in which he accepted the "incorporation theory" and was joined by three other justices, Frankfurter wrote one of his many separate concurring opinions which depicted his ideas concerning due process:

> Those reading the English language with the meaning which it ordinarily conveys, those conversant with the political and legal history of the concept of due process, those sensitive to the relations of the States to the central government as well as the relation of some of the provisions of the

15. Palko v. Connecticut, 302 U.S. 319, 326 (1937).
16. *Id.* at 325.
17. F. FRANKFURTER, LAW AND POLITICS 48 (1962).
18. *Id.* at 58.
19. F. FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT (1930).

> Bill of Rights to the process of justice, would hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight amendments.[20]
>
> . . . .
>
> The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offense. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. . . . The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not based upon the idiosyncracies of a merely personal judgment.[21]

The case involved the criminal procedure of California, but the ideas expressed, with slight alterations of phraseology, could have been directed at any piece of state legislation purportedly violating the due process clause.

Another example of Frankfurter's treatment of due process is found in the 1943 "Flag Salute Case,"[22] which overruled a previous decision[23] and decided that school children could not be required to salute the national flag if it offended their religious beliefs. In a dissenting opinion, Frankfurter, by origin an Austrian Jew, wrote some of the most poignant phrases to be found in judicial utterances:

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court's

20. Adamson v. California, 332 U.S. 46, 63 (1947) (concurring opinion).
21. *Id.* at 67-68.
22. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (dissenting opinion).
23. Minersville v. Govbitis, 310 U.S. 586 (1940) (majority opinion per Frankfurter, J.).

> opinion. . . . As a member of this Court I am not justified in writing my personal notions of policy into the Constitution. . . . I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship by employment of the means here chosen.[24]

In a speech case involving group libel, Frankfurter was again willing to permit the state legislature to make rational judgments for the good of the public order by prohibiting publications portraying the depravity or lack of virtue of a class of citizens. Punishment for uttering libelous statements, he concluded, was not a denial of due process.[25] As expected, he refused even to refer to the first amendment, causing three justices, Reed, Douglas and Black, to reiterate the "incorporation theory" in one form or another.

This brief excursion through scattered remarks of these two jurists is thought to have been necessary as a background for investigating Justice Harlan's ideas on the meaning of due process and that concept's applicability to civil liberty and to state restrictions which allegedly infringe upon such liberty. It is evident, as noted below, that he has accepted many of the principles expounded by his two predecessors and has coordinated them with his own notions of jurisprudence and the role of the judiciary in the American constitutional scheme of things.

III. THE DUE PROCESS CLAUSE AND STATE CRIMINAL PROCEDURE

The adoption of the fourteenth amendment marked the real beginning of federal activity in the area of state administration of criminal justice. But during the half century following ratification there was an absence of decisions in those areas which are of critical importance today. It was not until 1915 that the Court was presented with the problem of mob domination of a trial; not until 1932 that the right to counsel was raised; not until 1935 that the effect of perjured testimony was considered; and not

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24. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-47 (1943) (dissenting opinion).

25. Beauharnais v. Illinois, 343 U.S. 250 (1952).

until 1936 that the admissibility of a coerced (*i.e.*, involuntary) confession was before the Court.[26]

In the late fifties and early sixties, however, the Court began to tangle with these difficulties head-on, a process which necessarily involved the due process clause and demanded the attention of the Associate Justice from New York.

The recent opinions of Justice Harlan in this area of constitutional law reflect perhaps more than any others his philosophy of due process and his attitudes about that clause and its relationship to civil liberties. Thus, much attention is herein given to the writings on this subject.

In 1963, Justice Black delivered the opinion of the Court in a decision which overruled a twenty-year-old decision and held that the right to counsel guaranteed in the sixth amendment is a "fundamental safeguard of liberty" and thus protected against state invasion by the due process clause of the fourteenth. This "fundamental right essential to a fair trial" was held to apply not only to those who could afford to hire attorneys, but to obligate the state to provide counsel at the trial of an indigent.

Justice Harlan concurred, agreeing that the right to counsel was a fundamental right guaranteed by the fourteenth amendment, despite the fact that the Court was overruling a decision in which Justice Frankfurter had concurred in 1942. Whether Justice Frankfurter would have changed his mind about the issue if he had been on the bench in 1963 is doubtful, but such conjecture is immaterial: although accepting the great Justice's attitudes about the meaning of due process and the desirability of deferring to state practices, Justice Harlan is noted for his individualism and lack of undue dedication to any particular wing of the Court, and so he arrived at his own conclusions. But while agreeing with the results reached by the majority, Justice Harlan found it necessary to add the following remarks to emphasize the rationale of his position:

> When we hold a right or immunity, valid against the Federal Government, to be "implicit in the concept of ordered liberty" and thus valid against the States, I do not read our past decisions to suggest that by so holding we automatically carry over an entire body of federal law and apply it in full

26. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 4 (1956).

> sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions.[27]

Since the noted "incorporationist", Justice Black, was handling the majority opinion, Justice Harlan made some graceful parting remarks:

> In what is done today I do not understand the Court to depart from the principles laid down in Palko . . . or to embrace the concept that the Fourteenth Amendment "incorporates" the Sixth Amendment as such.[28]

Although Justice Harlan could strike a blow for civil liberties and basic fairness compatible with his philosophy of the due process clause and his attitude about the role of the judiciary in state actions in this instance, he found himself at odds with the majority when the Court applied federal standards to such procedural questions as search and seizure, incriminating statements and confessions.

Two years prior to the right-to-counsel landmark, the Court decided that the safeguard against unreasonable search and seizure of the fourth amendment carried with it to the states the application of the "exclusionary rule" first expounded for the federal system in *Weeks v. United States*.[29] This ruling required the fall of *Wolf v. Colorado*,[30] a 1949 case in which Justice Frankfurter, writing for the majority, had reached the opposite conclusion. Justice Harlan accepted the thesis that unreasonable searches and seizures invaded the right to privacy and was an unconstitutional intrusion violative of due process, but he could not agree that this conclusion should impose the exclusionary rule upon the states. In a dissenting opinion joined by the soon-to-retire Frankfurter, Justice Harlan made the following pertinent observations:

> This reasoning [of the majority] ultimately rests on the unsound premise that because Wolf carried into the States, as

27. Gideon v. Wainwright, 372 U.S. 335, 352 (1963) (concurring opinion).
28. *Id.*
29. 232 U.S. 383 (1914).
30. 338 U.S. 25 (1949).

> part of "the concept of ordered liberty" embodied in the Fourteenth Amendment, the principle of "privacy" underlying the Fourth Amendment, it must follow that whatever configurations of the Fourth Amendment have been developed in the particularizing federal precedents are likewise to be deemed a part of "ordered liberty," and as such are enforceable against the States. For me, this does not follow at all.
>
> . . . .
>
> [W]hat the Court is now doing is to impose upon the States not only the federal substantive standards of "search and seizure" but also the basic federal remedy for violation of those standards.[31]

Emphasizing the primacy of the doctrine of federalism, the Associate Justice asserted:

> An approach which regards the issue as one of achieving procedural symmetry or of serving administrative convenience surely disfigures the boundaries of the Court's functions in relation to the state and federal courts. . . . Here we review state procedures whose measure is to be taken not against the specific substantive commands of the Fourth Amendment but under the flexible contours of the Due Process Clause. I do not believe that the Fourteenth Amendment empowers this Court to mould state remedies effectuating the right to freedom from "arbitrary intrusion by the police" to suit its own notions of how things should be done . . . .[32]
>
> I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for Constitutional rights.[33]

It might be noted that Justice Cardozo rejected the *Weeks* exclusionary rule for the State of New York while chief justice of that bench, holding it inapplicable to the states through the due process clause and not commendable as a procedural device because "[t]he criminal is to go free because the constable has blundered."[34] Justice Clark, who was writing for

31. Mapp v. Ohio, 367 U.S. 643, 678-80 (1961) (dissenting opinion).
32. *Id.* at 681-82.
33. *Id.* at 686.
34. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

the majority, and Justice Harlan commented unfavorably and favorably, respectively, on that decision.

In a 5-4 decision, the Court in 1964 reversed several previous rulings and held that the privilege against self-incrimination is protected by the fourteenth amendment against abridgement by the states, and that such a privilege carries with it the federal standards. Justice Harlan wrote a strong dissent, reiterating his ideas concerning due process by quoting Justice Cardozo's classic expression in *Palko* (set forth above) and adding:

> It is apparent that Mr. Justice Cardozo's metaphor of "absorption" was not intended to suggest the transplantation of case law surrounding the specifics of the first eight Amendments to the very different soil of the Fourteenth Amendment's Due Process Clause. For, as he made perfectly plain, what the Fourteenth Amendment requires of the States does not basically depend on what the first eight Amendments require of the Federal Government.[35]

In a tone more emphatic than his statements on the subject in *Mapp*, he laid out his thoughts on federalism and his fears for its destruction:

> About all that the Court offers in explanation of this ["same standard"] conclusion is the observation that it would be "incongruous" if the different standards governed the assertion of a privilege to remain silent in state and federal tribunals. Such "incongruity," however, is at the heart of our federal system. . . .
>
> . . . If the power of the States to deal with local crime is unduly restricted, the likely consequence is a shift of responsibility in this area to the Federal Government, with its vastly greater resources. Such a shift, if it occurs, may in the end serve to weaken the very liberties which the Fourteenth Amendment safeguards by bringing us closer to the monolithic society which our federalism rejects.[36]

By 1964 the Court was unwilling, and perhaps unable, to draw back from constant involvement in the criminal law administration of the states. Thus it embarked upon an adventure into the police interrogation rooms which has not yet been concluded.

35. Malloy v. Hogan, 378 U.S. 1, 24 (1964) (dissenting opinion).
36. *Id.* at 27 & 28.

That year, in *Escobedo v. Illinois*[37] the Court held (again, 5-4) that when police investigation turns from general inquiry to accusation, certain warnings and right to counsel are necessary before any statement elicited by the law enforcement officials can be used against the accused at a criminal trial. Justice Harlan dissented. In 1966, the requisite warnings were clarified and the right to counsel was extended to indigents in the police station as Chief Justice Warren authored a police manual for the states. *Miranda v. Arizona*[38] was another 5-4 squeaker, and Justice Harlan penned a rather lengthy dissent. He underlined his disapproval of the decision in the concluding paragraph:

> Nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy-handed and one-sided action that is so precipitously taken by the Court in the name of fulfilling its constitutional responsibilities. The foray which the Court makes today brings to mind the wise and farsighted words of Mr. Justice Jackson: . . . "This Court is forever adding new stories to the temples of constitutional law and the temples have a way of collapsing when one story too many is added."[39]

IV. The Due Process Clause and Free Speech

A convenient distinction is made between the types of speech which if restricted can raise constitutional questions. Varying fact-situations, policy considerations and degrees of gravity of harm are involved. One type of speech is that which advocates the violent overthrow of the government; another is that which advocates unlawful and socially unacceptable conduct; a third category is that speech which does not advocate but incites violence; another type of speech involves defamatory statements impugning the character of another person; finally, there is obscenity. Restrictions and regulations that infringe the freedom of expression have necessarily involved state legislation and, therefore, the due process clause. This is another area of constitutional law with which the Court has been concerned recently, and, again, Justice Harlan's attitudes about the clause and its relationship to civil liberties are reflected in the decisions.

37. 378 U.S. 478 (1964).
38. 384 U.S. 436 (1966).
39. *Id.* at 525-26.

State and local loyalty oaths have posed problems for the Court, one of the more notable cases being *Elfbrandt v. Russell*[40] in which the Court in a 5-4 decision struck down an Arizona oath. Justice Harlan was one of the dissenters but did not write a separate opinion. He also dissented when the Court invalidated a Washington loyalty program in 1964.[41] It is apparent that he does not think that due process prohibits the states from conditioning public employment upon abstention from knowing membership in organizations advocating the violent overthrow of the government that employs them or from seeking to elicit information about or from prospective employees. In this he agrees with Justice Frankfurter.[42]

But in other instances involving freedom of expression and association, in which there was obviously no reasonable basis for the state's action, Justice Harlan has refused to allow these freedoms to be trampled. When Alabama tried to stifle the NAACP by requiring it to reveal its membership lists, he wrote the Court's opinion striking down such efforts.[43] Six years later Alabama was still meddling in the affairs of that organization on the premise that it was attempting only to regulate a foreign corporation, and Justice Harlan again wrote the Court's decision upholding the rights of the NAACP to refuse access to its membership lists.[44] Citing prior case law, the jurist made it clear that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[45] Unwilling to push this point so far as to prohibit a state from imposing regulations as to the manner of legal representation within its borders, he was forced to dissent in *NAACP v. Button*.[46] This distinction illustrates that Justice Harlan is not an "absolutist" on the issue of speech, and thinks that the due process clause

40. 384 U.S. 11 (1966).
41. Baggett v. Bullitt, 377 U.S. 360 (1964).
42. *See* Frankfurter's concurring opinion in Garner v. Board of Pub. Works, 341 U.S. 716, 724 (1951).
43. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).
44. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964).
45. *Id.* at 307, *quoting* from NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).
46. 371 U.S. 415 (1963).

leaves room for flexible standards and value judgments in each particular instance.[47]

New York Times v. Sullivan[48] moved the Court into another category of expression—defamation. Justice Harlan was with the other eight Justices in denying recovery for damages, agreeing with the view expressed by Justice Brennan that no action can be brought by a public official for a defamatory falsehood against his official conduct unless he proves that the statement was made with "actual malice" (*i.e.*, with knowledge that it was false or with reckless disregard of whether it was false or not). (Black, Douglas and Goldberg concurred in the result but were of the opinion that first amendment freedoms are absolute.) This type of decision, which allows dissemination of information about the activities of public officials, is in accord with the Brandeis "political truth" theory, which considered discussion and debate on varying views, particularly on matters of such consequence as government activities, to be of the essence of democracy and enlightened republicanism. Brandeis, as noted above, is a former Justice whose reasoning is held in high regard by Justice Harlan. This is probably why Justice Harlan warned the Court two years later[49] not to deviate from this rationale and abolish the common law tort of defamation altogether. Surely he felt that such an extension of *Sullivan* would be a result of specious reasoning, and was not called for by the due process clause when freedom of expression is grounded upon the theories of Brandeis.

It is on the issue of obscenity that the Court has been riding rough seas lately, and an examination of the opinions of Justice Harlan are illuminating.

It was in 1957 that the Court embarked upon this uncharted course, deciding in *Roth v. United States*[50] that obscenity is not within that area of constitutionally protected speech or press, and that obscenity is defined for judicial purposes as

47. *See, e.g.*, Frankfurter's concurring opinion in Adamson v. California, 332 U.S. 46, 63 (1947) and Cardozo's opinion for the Court in Palko v. Connecticut, 302 U.S. 319 (1937). These flexible standards and value judgments require what Justice Black termed in his *Adamson* dissent the "natural law theory" which, he contended, degrades "the constitutional safeguards of the Bill of Rights and simultaneously [appropriates] for this Court a broad power which we are not authorized by the Constitution to exercise." Adamson v. California *supra* at 70.

48. 376 U.S. 254 (1964).

49. Rosenblatt v. Baer, 383 U.S. 75, 96 (1966) (concurring opinion).

50. 354 U.S. 476 (1957).

material which deals with sex in a manner appealing predominately to prurient interest and is utterly without redeeming social importance. Since this case involved a federal postal statute, due process was not relevant to the determination of the issue. But because the Court applied the same standards to a companion state case, Justice Harlan wrote a separate opinion.[51] He rephrased the question as it concerns federal restriction of expression: "[W]hether the federal obscenity statute, as construed and applied in this case, violates the First Amendment to the Constitution."[52] He thought the *Roth* test was not sufficiently restrictive—"the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book"[53]—and should permit the central government to exclude from the mails only that literature which can be described as "hard-core pornography." But he insisted that the question as it pertains to state legislation should be phrased differently: "[W]hether the defendant was deprived of liberty without due process of law when he was convicted for selling certain materials found by the judge to be obscene . . . ."[54]

Why this distinction? Because state and federal powers in this area are not the same. Why are they not the same? Because first, the fourteenth amendment does not "incorporate" the blunt and specific wording of the first amendment, and this is so because second, the national commitment to the idea of federalism (sprinkled lightly with a dash of judicial restraint) precludes the judiciary from constructing questionable historical or philosophical rationalizations for requiring that all states conform to the mandates intended originally to be directed at the federal authorities.

This differentiation between state and federal powers which Justice Harlan supports in this area of civil liberties is nowhere better underscored than in the series of cases following *Roth*. In *Ginzburg v. United States*,[55] in which the Court upheld a conviction under a federal statute, he dissented, arguing that the First Amendment is a tight restraint upon federal laws banning

51. *Id.* at 496 (concurring in Alberts v. California and dissenting in Roth v. United States).
52. *Id.* at 503.
53. *Id.* at 506.
54. *Id.* at 500.
55. 383 U.S. 463 (1966).

expression and can be constitutionally applied only to "hard-core pornography." But in two state cases, handed down the same day, he opted for deference to the legislatures, concurring when the Court upheld a conviction and dissenting when the Court struck down another.[56] He made his point in his dissent in the Fanny Hill case:

> [T]he Constitution does not bind the States and the Federal Government in precisely the same fashion. This approach is plainly consistent with the language of the First and Fourteenth Amendments and, in my opinion, more responsive to the proper functioning of a federal system of government in this area. . . . [T]he decisions have never declared that every utterance the Federal Government may not reach or every regulatory scheme it may not enact is also beyond the power of the State.[57]

After agreeing that federal suppression of expression is constitutionally limited, and that Fanny Hill is not such "hard-core pornography" that it should be barred from the mails, he emphasizes the difference between this stance and the role of the state in this country:

> [T]he Fourteenth Amendment requires of a State only that it apply criteria rationally related to the accepted notion of obscenity and that it reach results not wholly out of step with current American standards. As to criteria, it should be adequate if the court or jury considers such elements as offensiveness, pruriency, social value, and the like. The latitude which I believe the States deserve cautions against any federally imposed formula listing the exclusive ingredients of obscenity and fixing their proportions.[58]

Since there is plenty of room for disagreement in this area of constitutional law,[59] he explained, why not permit the states to experiment within the limits of rationality as defined in his opinion, for indeed experimentation "is the underlying genius of our federal system."

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56. A Book v. Massachusetts, 383 U.S. 413 (1966); Mishkin v. New York, 383 U.S. 502 (1966).

57. A Book v. Massachusetts, 383 U.S. 413, 456 (1965) (concurring opinion).

58. *Id.* at 458.

59. The disagreement will become apparent through a quick glance at the different opinions in the cases and the reasoning used to support the opinions.

V. THE DUE PROCESS CLAUSE AND OTHER STATE RESTRICTIONS ON FREEDOMS

Justice Harlan has been with the majority on the recent freedom of religion cases, recognizing that for a state to try to establish a religion or deny the free exercise thereof would be a deprivation of liberty without due process.[60] He agreed with Justice Goldberg in *School District v. Schempp*[61] when the younger Justice pointed out in a concurring opinion that the decisions of the Court did not foreclose the government's "cognizance of the existence of religion." In the cases involving the Sunday Blue Laws,[62] he was again with the Court when these state statutes were upheld. He joined Justice Frankfurter's concurring opinion in which the latter concluded that Sunday has become in part at least a secular institution and that Sunday restrictions can reasonably be said to serve a "substantial nonecclesiastical purpose relevant to a well-ordered social life," so that the legislative discretion should stand.

In *Cox v. Louisiana*[63] the Court reversed convictions of three criminal charges against a Negro minister who had led a civil rights march in Baton Rouge. The case involved not only speech but also a mixture of assembly, protest and association. The decision was by a 5-4 margin, with such a staunch supporter of free speech as Justice Black balking at some portions of the Court's rulings. Justice Harlan dissented, finding no denial of due process in the actions taken by the state against the crowd of 2,000 demonstrators.

It is sometimes surmised, without a careful reading of the opinions and the rationale involved, that because Justice Harlan is frequently not on the "side" of the Court's "civil libertarians" he is an anti-liberal, etc. This paper has presumably dispelled such simplistic and misinformed notions, but if there is lingering questions, *Griswold v. Connecticut*[64] is interesting. In that case the Court struck down Connecticut's anti-contraceptive statute. Justice Douglas wrote for the Court, holding the law unconstitutional because of a series of penumbras and emanations from

60. 374 U.S. 203 (1963); *see* Engel v. Vitale, 370 U.S. 421 (1962).
61. 374 U.S. 203, 305 (1963) (concurring opinion).
62. Braunfeld v. Brown, 366 U.S. 599 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).
63. 379 U.S. 536 (1965).
64. 381 U.S. 479 (1965).

the Bill of Rights which reflect a societal value of privacy and freedom of association in the marital bedroom. Several other Justices used other devices to find the law invalid. Justice Black was caught in the web that he had spun in *Adamson*, and since he could find no explicit reference to privacy in the Bill of Rights that could be "incorporated" into the fourteenth, he dissented. Justice Harlan agreed in the Court's reversal of the conviction but, of course, not because of the ninth amendment or any other of the first ten amendments.

> [W]hat I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to *restrict* the reach of the Fourteenth Amendment Due Process.[65] For me this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to impose upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them. . . .[66]
>
> In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty" . . . . I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.[67]

Summarizing his reasons for following this approach to state civil liberties cases, Justice Harlan called for judicial self-restraint, and said that this would be achieved "only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrine of federalism and separation of powers have played in establishing and preserving American freedoms."[68]

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65. This is what Justice Black did in his dissent.

66. This is what the Court had been doing in many cases, such as in the field of criminal procedure.

67. Griswold v. Connecticut, 381 U.S. 479, 500 (concurring opinion).

68. *Id.* at 501.

VI. CONCLUSION

Should a man of less preception and articulateness have tried to adopt the profound thinking of Holmes, Brandeis, Cardozo and Frankfurter, and applied them to contemporary problems, the results may well have been ludicrous. This is not the case, however, with Justice Harlan, whose scholarship, objectivity, dispassionate approach to key emotional issues, and earnest respect for the constitutional scheme of government, have made him a worthy successor to those Justices whose ideals he now represents on the Court. That he is not a "judicial activist" at a point in time when such an approach is fashionable should not diminish his stature. His treatment of civil liberty cases within the due process clause no doubt causes him in many instances to decide a case quite differently from his personal tastes. But such is the role of a judge. To paraphrase a statement which Justice Harlan himself made referring to another Justice: He brings to bear on his judgments a deep understanding of the nature and values of federalism, a scrupulous observance of the boundaries between the various branches of government, and a sensitive regard for the balance that must ever be achieved in a free society between individual rights and governmental power.[69]

69. Harlan, *The Frankfurter Imprint As Seen By a Colleague,* 76 HARV. L. REV. 1, 2 (1962).